State Judicial Elections

The Politization of America's Courts

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Preface

Special rules have always governed the selection and removal of judges—both federal and state—in order to ensure that judges are sufficiently insulated from politics and public clamor to be able to faithfully administer justice in accord with the rule of law and serve as effective guardians of people's individual rights—even in the face of public opinion or political pressure to the contrary. Although most state court judges are elected, special rules governing those elections have sought to ensure that judicial elections are conducted differently than elections for political office in ways that protect the integrity, fairness, and impartiality of the judiciary in performing its unique role under the American system of government.

Today, however, judges and the special rules that insulate them from politics are under political attack. State judicial elections have become increasingly like elections for political office: expensive, contentious, political, dominated by special interests, and partisan. With over 80 state supreme court seats in 30 states on the ballot in the fall of 2006, as well as thousands of lower court positions, there is every reason to think that recent trends will get much worse long before they ever get better.

Today's judicial elections present the following four critical challenges to the ability of elected state judges to fairly and impartially uphold the rule of law:

- The ever-rising tide of campaign spending, television advertising, and the influence of special interests;
- Political attacks on judges and courts based on disagreement with judicial decisions;
- A new politics of judicial elections ushered in by the freedom of—and pressure on—judicial candidates to announce their views on hot-button social and political issues; and
- The threatened increase in partisan involvement in "nonpartisan" judicial elections.

Campaign contributions to candidates for state supreme courts increased over 750 percent between 1990 and 2004. Nearly three-fourths of the 2004 contributions came from business interests, lawyers, or political parties. In one state a company executive, with an appeal pending to the state supreme court from a $50 million verdict against his company, contributed $2.4 million to help defeat an incumbent supreme court justice perceived to be antibusiness. In 2004, television ads appeared in 80 percent of the states with contested supreme court elections. The number of negative, attack ads nearly doubled from 2000. Almost 90 percent of the attack ads were paid for by either special interest groups or a political party. Seventy-one percent of the American public, and almost one-third of state judges subject to election, feel that campaign contributions from special interests influence judicial decisions.

Challenges to the fairness and impartiality of state courts frequently occur in the context of contested judicial elections or take the form of well-publicized attacks on judges that are used to energize the political base of a political party or special interest group. Increasingly, such challenges attack the courts themselves or seek to dramatically alter judicial selection processes or the nature of judicial office itself in a dangerous and misguided effort to hold judges more accountable to the public will for their specific judicial decisions. The JAIL (Judicial Accountability Initiative Law) Amendment on

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the South Dakota ballot this November, for example, would essentially abolish the doctrine of judicial immunity and create a special grand jury with the power to determine issues of judicial immunity and to indict, try, and sentence judges for criminal conduct. Judicial accountability initiatives on the ballot in other states this fall would impose term limits on appellate justices, authorize recall of judges, require appellate judges to be elected in districts, and allow for peremptory challenges of appellate justices.

Traditional notions that judges and judicial candidates should maintain the dignity appropriate to judicial office, uphold the impartiality and fairness of the judiciary, and be influenced by neither their personal views nor any partisan interest, public clamor, or social or political relationship are severely tested. Federal court decisions rejecting traditional restrictions on judicial campaign speech have spawned candidate questionnaires that regularly invite and pressure candidates to state their personal views on controversial legal and political issues, and candidates increasingly do so.

In order to better insulate elected state judiciaries from improper political influence, states have turned increasingly to "nonpartisan" elections in which judicial candidates are not nominated by a political party and ballots do not identify the candidates' party affiliations. The polarization of American politics and a recent federal circuit court opinion[1] threaten to convert all judicial elections into partisan affairs.

These challenges, now overwhelming in scale, have gradually overtaken the state courts in the past 10 to 15 years. Many affected state judiciaries have been taken quite by surprise. Unless the California bench and bar devote conscientious attention to these threats, without delay, and thoughtfully consider potential ways of avoiding or mitigating them, there is little reason to believe that these same challenges will not also overrun California's judiciary. California has no judicial immunity from these national challenges. There is little, if anything, in California's Constitution, statutes, Rules of Court, or Canons of Judicial Ethics that provides any clear protection against the spread of these challenges to California.

This article describes how these four critical challenges are dramatically changing the landscape of state judicial elections and politicizing America's state courts.

We begin with a brief history of state judicial selection and removal processes.

History of Judicial Selection and Removal

In the United States issues surrounding the best method of selecting and removing judges are as old as the republic itself. Although the United States has consistently sought from the very beginning of the republic to insulate judges from political pressure and "the occasional ill humors in the society," it is in the manner of selecting and removing judges that American ambivalence about the extent to which judges should be independent of the prevailing popular will most clearly surfaces.

Among "the causes which impel[led the signers of the Declaration of Independence] to the separation" was the signers' specific complaint that the King of England "ha[d] made judges dependent on his will alone, for the tenure of their offices." In Federalist Paper No. 78, Alexander Hamilton more fully discussed the risks inherent in making judges dependent for their tenure in office on either the legislative or executive branch of government or the will of the people. In light of the federal judiciary's "arduous" duty "to guard the Constitution and the rights of individuals" against legislative encroachments and those "ill humors which the arts of designing men . . . sometimes disseminate among the people themselves," Hamilton

argued that the "complete independence" of the judiciary was "an indispensable ingredient" of the proposed constitution. "Nothing can contribute so much to [the judiciary's] firmness and independence," he concluded, "as permanency in office." "Periodical appointments, however regulated, or by whomsoever made," he warned, "would, in some way or other, be fatal to [judges'] necessary independence." If "the power of making [such temporary appointments] was committed either to the Executive or legislature, there would be danger of an improper complaisance to the branch which possessed it. . . . [I]f to the people," Hamilton continued, "there would be too great a disposition to consult popularity, to justify a reliance that nothing would be consulted but the Constitution and the laws." With uncanny foresight, Hamilton also observed that temporary terms of office "would naturally discourage" qualified candidates "from quitting a lucrative line of practice to accept a seat on the bench."[2]

Both the federal government and the original 13 state governments therefore sought to obtain the most qualified judicial candidates and to protect the independence of judges in office primarily by granting judges life tenure subject to good behavior, thus insulating sitting judges from the political pressures that would result from dependence on the will of others for remaining in office.[3] The federal and original state constitutions also provided, of course, for the appointment of judges by either the executive or legislative branch and for protection against diminution of salary. Growing dissatisfied with judicial appointment processes, however, states began as early as 1791, upon Vermont's admission to the Union, to provide for the election of at least some of their judges for a term of years. First Mississippi (in 1832) and then New York (in 1846) required that all judges be selected through partisan elections. In the 14 years following New York's decision, 21 states convened constitutional conventions during which 19 of the 21 states chose to elect their judges. By the time of the Civil War, 24 of the 34 states had established an elected judiciary. As new states were subsequently admitted to the Union, they all adopted popular election of some or all judges, until the admission of Alaska in 1959.[4]

Although the transition from appointment to election of judges in the middle of the 19th century is often attributed to populist ideals associated with Jacksonian democracy, historian Kermit Hall's research into the constitutional conventions of that era found that moderate lawyers and judges, not populists, dominated the constitutional debates. The lawyers and judges advocated judicial elections as a means of controlling the excessive partisanship and patronage that infused the distribution of judgeships by party-dominated gubernatorial offices and legislatures.[5] They argued that popular elections would promote "a more efficient administration of justice, an increase in the status of the bench and bar, an end to the penetration of partisan politics into the selection process, and increased independence and power for appellate and, to a lesser extent, trial judges. . . . Elect your judges," one proponent of judicial elections argued, "and you will energize them, and make them independent, and put them on a par with the other branches of government."[6]

"[I]ssues surrounding the best method of selecting and removing judges are as old as the republic itself."

In order to limit the potentially adverse consequences of popular election of judges, however, the proponents of popular election created special rules applicable only to judges: rules providing for longer terms of judicial office than for other public offices, requiring judges to have special training or qualifications, making judges ineligible for other offices during their terms of judicial office, requiring staggered elections, and subjecting only judges to mandatory retirement as well as to impeachment and other formal disciplinary processes. Some or all of these constitutional provisions

still today distinguish judicial office from other elected offices in states with some form of judicial election.[7]

Concerns about the undue influence of political machines in judicial elections surfaced as early as 1870, however, and in his famous 1906 address on the "Causes of Popular Dissatisfaction with the Administration of Justice," Roscoe Pound called for the elimination of judicial elections, warning that "compelling judges to become politicians . . . has almost destroyed the traditional respect for the bench." Although few efforts were made to return to systems of judicial appointment, states did once again seek to insulate judges from politics, this time by adopting nonpartisan elections for judicial positions and seeking to regulate judicial candidates' partisan political activities.[8] By 1927, 12 states employed nonpartisan judicial elections.[9]

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Similar concerns about undue political influence in California's system of gubernatorial appointment of appellate justices led the Commonwealth Club of San Francisco, California Chamber of Commerce, and California State Bar Association to sponsor the "California Plan." The California Plan was adopted by California voters in 1934 and required that appellate court appointments be approved by a newly created Commission on Judicial Appointments and then confirmed in a subsequent popular, but uncontested, election.[10]

The concept of judicial selection by gubernatorial appointment followed by popular but uncontested "retention" election was shortly expanded to trial court judges as well. After defeat of judicial election reform plans in Ohio and Michigan in 1938, Missouri voters adopted the "Missouri Plan" in 1940. Designed to secure the impartial selection of judges, eliminate the haphazard results of contested judicial elections, and relieve judges of the pressures of political campaigning, the Missouri Plan provided for nonpartisan judicial nominating commissions and confirmation of gubernatorial appointments in nonpartisan retention elections. Eighteen other states adopted variations of the Missouri Plan, or so-called merit selection, for at least some of their judicial positions over the ensuing decades.[11] New Mexico, the

Initial Selection: Trial Courts of General Jurisdiction

Merit Selection (16)	Partisan Election (9)	Nonpartisan Election (17)	Gubernatorial (3) Legislative (2) Appointment	Combined Methods (4)[1]
Alaska	Alabama	Arkansas	Maine (G)	Arizona
Colorado	Illinois	California	New Hampshire (G)	Indiana
Connecticut	Louisiana	Florida	New Jersey (G)	Kansas
Delaware[2]	New York	Georgia	South Carolina (L)	Missouri
District of Columbia	Ohio[3]	Idaho	Virginia (L)	
Hawaii[4]	Pennsylvania	Kentucky		
Iowa	Tennessee	Michigan		
Maryland[2]	Texas	Minnesota		
Massachusetts[2]	West Virginia	Mississippi		
Nebraska		Montana		
Nevada		North Carolina		
New Mexico		North Dakota		
Rhode Island		Oklahoma		
Utah		Oregon		
Vermont		South Dakota		
Wyoming		Washington		
		Wisconsin		

1. In these states, some judges are chosen through merit selection and some are chosen in competitive elections.
2. Merit selection is established by executive order.
3. Candidates appear on the general election ballot without party affiliation but are nominated in partisan primaries.
4. The chief justice makes appointments to the district court and family court.

last state to do so, adopted a partial merit selection system in 1994. All merit selection efforts since then have been defeated, most recently in Florida in 2000 and South Dakota in 2004.

Despite Roscoe Pound's call in 1906 for an end to judicial elections, judicial elections are as large a part of the judicial selection landscape today as they were 100 years ago. Eighty-six percent of state judges were elected in 1906 and 89 percent are elected in one way or another today.[12] Although the movement from partisan contested elections to nonpartisan retention elections stalled in the early 1990s, the transition from partisan contested elections to nonpartisan contested elections has continued. Indeed, the failure of recent efforts to adopt merit selection systems, and the perceived inability in any state in today's political climate to change from a system of contested elections to a merit selection system, has provided further impetus in states with contested elections to change from partisan to nonpartisan elections. Most recently, Arkansas switched in 2000 to nonpartisan election of all its judges, and in 2002 North Carolina completed its switch from partisan to nonpartisan election of all of its judges. Today, 19 states, including California, utilize nonpartisan contested elections for at least some of their judicial positions, and 17 states, again including California, use nonpartisan retention elections for at least some positions. Altogether, 32 states today use some form of nonpartisan election for at least some of their judicial positions.[13]

A recent study based on the degree of correlation between voting percentages in partisan gubernatorial elections and voting percentages in state nonpartisan judicial elections indicates, however, that partisan cues have come to play an increasingly important role in some nominally nonpartisan judicial races, especially since 2000.[14] The Democratic and Republican parties were actively involved, for example, in Georgia's 2004 "nonpartisan" election, and, for the first time, a political party (Democrats) sponsored television ads for a judicial candidate in a nonpartisan campaign. As we further discuss below, it is becoming increasingly doubtful that states with nonpartisan elections will be able to retain the "nonpartisan" character of their judicial elections in the future.

The chart opposite describes the current judicial selection systems for state trial courts of general jurisdiction throughout the country.[15] Many states, including California, employ different selection processes for appellate courts than trial courts, for different levels of trial court, or for some trial courts than for other trial courts.

The Ever-Rising Tide of Campaign Spending, Television Advertising, and Special Interests

Electing state court judges attuned to a particular special interest or ideology, and defeating those not so attuned, is increasingly viewed by political parties and special interests as politics—and business—as usual. Reaching voters with a cleverly crafted political ad usually requires television time, and this is very expensive. So it takes money to be successful. The title of an article in *George* magazine, reviewing the five notorious supreme court races in Ohio and Michigan in 2000 that, altogether, cost $19 million, describes what's wrong with this trend: "The Best Judges Money Can Buy: Businesses, Unions, and Lawyers Are Pouring Millions of Dollars Into State Supreme Court Races—And May Walk Off With the Judicial System's Integrity." One of the lawyers who participated in a fundraiser for the Michigan incumbents confided to *George:* "I always knew you could buy the executive and legislative branches. But I never thought you could buy the judiciary, and that's what really troubles me."[16]

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There is little national historical data on the extent of contested state judicial elections at the trial court level.[17] At the state supreme court level, however, the ever-rising tide of "nastier, noisier, and costlier" judicial elections can be traced back to the mid-1990s. A few even earlier elections, however, seemed to set the stage for the trend that emerged in the mid-1990s. In 1978, for example, deputy district attorneys in Los Angeles ran an ad in the local legal newspaper seeking candidates to run against unchallenged incumbent trial judges. The successful campaign resulted in contests and defeats for an unprecedented number of sitting judges.[18] Two years later, three candidates for open seats on the Texas Supreme Court raised $1.8 million, one of the most expensive high court races ever at that time. In 1986, California witnessed what might still be considered the most expensive judicial campaign in history when $10.7 million was spent in the campaign denying retention of Chief Justice Rose Bird and Justices Joseph Grodin and Cruz Reynoso.[19]

Although challenges in retention elections of supreme court justices are rare, in states where these justices are elected in partisan or nonpartisan contested elections, incumbents have faced electoral challenge in about 75 percent of their races since 1996.[20] In 2004, state supreme court incumbents faced opposition in 18 of the 20 states with contested elections on the ballot. Indeed, since 1996 partisan state supreme court races have more frequently been contested than partisan races for the U.S. House of Representatives. Moreover, the average margin of electoral victory for incumbents in the contested judicial elections is only about 57 percent of the vote, lower than the average vote margin for incumbents in contested House seats, which is about 65 percent. In partisan supreme court races incumbents have been defeated, on average, in almost 25 percent of contested races, whereas U.S. House members have been defeated, on average, in only 6 percent of contested races.

Spending for supreme court races has also increased dramatically since 1994.[21] Candidate fundraising totaled $20.7 million in 1994 but more than doubled to $46.8 million in 2004, breaking candidate fundraising records in 19 states in 2000 and 2004. In the 2002 Ohio Supreme Court election, two successful candidates raised more money than one of the gubernatorial candidates.[22] Two Illinois Supreme Court candidates in 2004 combined to raise more than $9.3 million, despite the fact that the race was to represent only one of the five supreme court districts in the state. The average cost of winning in 2004 jumped 45 percent from the elections just two years earlier, to over $650,000. The candidate raising the most money won in over 80 percent of the races. In West Virginia a company executive with an appeal pending to the supreme court from a $50 million verdict against the company gave the largest-ever individual contribution of at least $2.4 million to a political action committee (PAC) that funded the successful campaign against an incumbent justice claimed to be antibusiness.

The primary sources of funding for supreme court election campaigns are the business community, labor organizations, and lawyers. The U.S. Chamber of Commerce and other business groups invested $21.5 million in 2004 in candidate contributions and airtime for independent media campaigns. Lawyer and labor groups invested $13.3 million in candidate contributions and television spots. The chamber claimed victory in 12 of the 13 state supreme court races that it targeted in 2004.[23]

In many states, contributions to judicial candidates are subject to legally prescribed limits, often the same limits as those for political candidates. Existing contribution limits, however, have proven largely ineffective.[24] One problem is that such limits typically do not prevent businesses, law firms, or other organizations from contributing through their employees and other related individuals and entities.

Newly enacted campaign contribution limits in the state of Washington this year illustrate two other problems. In the absence of such limits in 2004, a candidate successfully defeated an incumbent supreme court justice with the support of large contributions from the building industry and from a company that had recently suffered a multimillion dollar judgment in a decision authored by the defeated justice. In reaction to the 2004 campaign, the Washington legislature earlier this year enacted legislation requiring judicial candidates to comply with the limits applicable to other candidates for statewide office—$1,400 for the primary election and $1,400 for the general election. The new limits were approved in March but did not go into effect until June. While other supreme court candidates immediately complied with the new limits, a property rights attorney seeking to unseat Washington state's Chief Justice Gerry Alexander raised nearly $190,000 in amounts that exceeded the new limits before they went into effect. The bulk of the contributions came from real estate developers and others in the construction industry. By the time of the primary election in September, Alexander, a two-term incumbent, had raised $260,000 while his opponent had raised $440,000.[25]

Washington's new contribution limits also illustrate a more common problem: that limits can easily be evaded by contributions to PACs, political parties, and other independent third parties. In Washington, for example, the new limits spawned two new political action committees this year. The Constitutional Law PAC was launched by business and property rights interests and chaired by former Republican U.S. Senator Slade Gorton. The PAC raised and spent more than $1.7 million from the Building Industry Association of Washington, Americans Tired of Law Suit Abuse, and others in opposing Alexander and another supreme court justice. Labor unions, trial lawyers, teachers, and others formed FairPAC, which raised and spent $500,000 to counter the spending by conservative groups. The Alexander race was not only the most expensive Washington Supreme Court race ever, but also, according to court observers, the nastiest.[26] While Chief Justice Alexander reported feeling "sort of hopeless in all of this . . . like I'm in the eye of the hurricane," a *New York Times* editorial entitled "Judicial Politics Run Amok" concluded: "There is no perfect way to choose a judge. But to undermine the whole purpose of the court system by allowing special interests to buy judgeships, or at least try to, is the worst system of all."[27]

Unlike direct contributions to candidates, the sources of contributions to such "independent" groups, used primarily for television "issue advertising," are often not subject to disclosure. A recent report by the Center for Political Accountability, for example, unravels the ways in which prominent American corporations used their 2004 contributions to leading national trade groups—the U.S. Chamber of Commerce, National Association of Manufacturers, Business Roundtable, American Insurance Association, and others—to conceal their support of judicial candidates in Illinois, Ohio, West Virginia, Alabama, Mississippi, Louisiana, and Texas. In many of those states the undisclosed corporate support went to candidates espousing views on social issues such as gay rights and diversity that were inconsistent with the corporations' own corporate policies.[28]

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Fueling the rising costs of judicial election campaigns is the high cost of television advertising. The number of television ads run in 2004 almost doubled the number run in 2000 and appeared in four times as many states at over two and a half times the cost. The number of attack ads nearly doubled over those in 2000. In 2004, special interest groups and political parties provided over three-quarters of the candidate funding and paid for almost 90 percent of the attack ads. The candidate airing

the most ads usually won. In 2004, the candidate with the most supporting ads won 29 of the 34 supreme court races, including the race in West Virginia. The amount spent on ads supporting the victor were at least double the amount spent on ads supporting the loser.

The campaign against the incumbent in West Virginia featured a controversial attack ad accusing the incumbent, who had been in the majority in a 3–2 decision that allowed a convicted sex offender to remain on probation and work in a private school as part of his rehabilitation, of "letting a child rapist go free to work in our schools." A television ad in the recent 2006 primary campaign against the chief justice in Washington featured a woman accusing Alexander of letting her three-year-old son's killer go free after serving less than one-third of his murder sentence; the killer had been released from prison early as a result of the decision in another case in which Alexander had voted with the majority in holding that under Washington statutes assault could not be the basis of a felony-murder conviction. An editorial in the *New York Times* concluded: "Some of the television and radio attack ads against the incumbent chief justice, Gerry Alexander, were so unfair and misleading they would have seemed out of line even if the contests were for local alderman instead of a lofty position on the state's highest court."[29]

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The state in which supreme court candidates have raised the most money since the mid-1990s is Alabama, where candidates raised more than $42.6 million through the 2004 elections. Alabama is also home to two of the three most expensive supreme court races in American history. Chief Justice Roy Moore's removal from office in 2004 for refusing to comply with a federal court order to remove the Ten Commandments monument from the supreme court building led to a raucous 2004 Republican primary election in this heavily Republican and socially conservative state—and to another equally raucous Republican primary election in the summer of 2006. In 2004, with the backing of the League of Christian Voters ("Alabama Christians are now more concerned than ever about electing bold Christians to these Supreme Court seats."), Thomas Parker, a former assistant state court administrator under Moore, successfully defeated an incumbent justice who had been critical of Moore.[30] In 2005, Justice Parker authored press releases criticizing the "state-sanctioned killing" of Terri Schiavo and the U.S. Supreme Court's "judicial power grab" in its Ten Commandments rulings. Forced to recuse himself in a juvenile death penalty case, he expressed outrage when his colleagues followed the recent U.S. Supreme Court precedent in *Roper v. Simmons*[31] and reversed the death penalty imposed on the 17-year-old defendant. In a newspaper op-ed piece earlier this year, he argued that "state supreme court judges should not follow obviously wrong [U.S. Supreme Court] decisions simply because they are precedents."[32]

This June, the Alabama Republican primary featured races by the former Chief Justice Roy Moore against the incumbent governor; by Justice Parker against Drayton Nabers, the governor's former finance director appointed to replace Moore as Chief Justice; and by a "Moore slate" of four candidates against four other supreme court justices. The supreme court primary candidates spent a combined $4.6 million and, together with the Washington, D.C.–based American Taxpayer's Alliance, combined to spend almost $2.7 million on television advertising—a 59 percent increase over the 2004 primary election. Chief Justice Nabers was the biggest spender on television advertising, airing over 2,300 commercials in the state's major television markets. Parker and the other candidates on the "Moore slate" all lost.[33]

There is substantial evidence that the dominant role of campaign contributions in judicial

elections undermines public trust in the fairness and impartiality of the judiciary. A recent examination of the Ohio Supreme Court by the *New York Times*, for example, looked at financial contributions to justices by parties and other groups filing supporting briefs in 1,500 cases over the past 12 years. The *Times* found that the justices, on average, ruled in favor of their contributors 70 percent of the time. One justice voted in favor of his contributors 91 percent of the time.[34]

Justices rarely recuse themselves on the basis of a party's prior campaign contributions. Despite the fact that the *Times* only considered substantial contributions of $1,000 or more during the six years immediately preceding the Ohio decisions, the justices almost never disqualified themselves from hearing such cases.[35] In April of this year, a West Virginia Supreme Court justice who had been elected in 2004 with the help of at least $2.4 million of financial support from the CEO of a coal mining company refused to disqualify himself from an appeal by the company from a $50 million jury verdict. Similarly, an Illinois Supreme Court justice who had won election to that state's supreme court in 2004 with substantial financial support from a tobacco company with a pending case in the court refused to recuse himself last year and cast the deciding vote in reversing a $10 billion judgment against the company.[36]

One justice interviewed by the *Times* said, "I've never felt so much like a hooker down by the bus station in any race I've ever been in as I did in a judicial race." The contributors "mean to be buying a vote," he concluded. "Whether they succeed or not, it's hard to say."[37] A retired West Virginia chief justice spoke more plainly: "It's pretty hard in big-money races not to take care of your friends," said Richard Neely. "It's very hard not to dance with the one who brung you."[38]

A 2004 national public opinion survey found that 71 percent of Americans believe that judicial campaign contributions from special interest groups affect judges' decisions in the courtroom. Moreover, a 2002 survey of state judges revealed that 58 percent of judges subject to judicial elections said they felt under pressure to raise money for their campaigns during election years, and almost half of those judges felt they were under a "great deal" of pressure. In addition, 32 percent of those responding said they felt campaign contributions had some or a great deal of influence on judges' decisions.[39]

Attacks on Judges and Courts

Roscoe Pound also observed 100 years ago that "dissatisfaction with the administration of justice is as old as law." Attacks on judges and courts arising out of unpopular judicial decisions aren't new. Indeed, at the time of Pound's writing, justices of the U.S. Supreme Court were under attack as "activist judges" for throwing out state regulations governing private economic relations as unconstitutional on the basis of their own personal laissez-faire economic theories. Recall also the early impeachment of Justice Samuel Chase by the Republicans, congressional reaction to the *Dred Scott* decision, President Franklin Roosevelt's infamous court-packing plan, and the outrage over *Brown v. Board of Education* culminating in the Southern Manifesto signed by 100 members of Congress.

"The stridency of these political attacks on judges reflects an overly politicized federal judicial selection process . . . ."

Yet even judged by this historical standard, the intensity, breadth, and nature of current attacks on judges seem not only unprecedented but excessive. Angry that the courts would not intervene as Congress and the President wished to prevent Terry Schiavo from realizing her own wishes, the Majority Leader of the House threatened: "We will look at an arrogant, out of control, unaccountable judiciary

that thumbed their nose at the Congress and President when given jurisdiction to hear this case anew. . . . The time will come," Majority Leader Tom DeLay continued, "for the men responsible for this to answer for their behavior. . . ." Texas Senator John Cornyn, a former Texas Supreme Court justice upset about the recent U.S. Supreme Court decision in *Roper*, speculated that recent courthouse violence resulting in the death of several judges might be due to public frustration with such decisions. Not to be outdone by calls for the impeachment of Justice Anthony Kennedy, who wrote the majority opinion in *Roper*, author Edwin Vieira said his "bottom line" for dealing with such errant judges came from Joseph Stalin: "He had a slogan and it worked very well for him whenever he ran into difficulty," Vieira declared: "'No man, no problem.'"[40]

"Unlike the past, today an extremely broad range of . . . issues are the subject of attacks on judges, including aid to private schools, the death penalty, immigration, abortion, takings of private property . . . teaching of evolution, affirmative action, gay rights and marriage, references to "God" in the Pledge of Allegiance . . . sentencing decisions, and end-of-life decisions."

The stridency of these political attacks on judges reflects an overly politicized federal judicial selection process in which appointment and confirmation of federal judges is increasingly viewed by both Republican and Democratic activists as one of their top political priorities. The overheated rhetoric and overly politicized judicial selection process in Washington create a national climate of public opinion conducive to similar attacks on state judges and to the politization of state judicial selection and removal processes as well.

Attacks on the state courts come not only from politicians and political parties but also from the special interest groups that often constitute their political base. As *Business Week* reported shortly before the 2004 judicial elections, special interest groups increasingly "have come to view the judiciary as something to be gamed and captured—just like Congress or the State House."[41] One of the most active special interest groups is the business community. The U.S. Chamber of Commerce has spent an estimated $50 million on judicial races since 1998. "[W]e've declared war on judges who aren't doing their duty," said one business spokesperson of judges considered to be antibusiness.[42]

In the state of Washington, the public relations director of the state building industry association authored an op-ed piece in the *Seattle Times* this summer calling for the defeat of two justices on the supreme court, including the chief justice, because of their votes with the majority in two "unacceptable" eminent domain rulings. "Justices on the court must answer for their actions," she said. "Facing the retribution of voters is the key component to keeping justices in check. That's what elections are about—retribution or, conversely, re-election."[43]

Religious conservatives have also been particularly active in attacking judges on issues such as school prayer, abortion, and gay marriage. Colorado evangelist James Dobson is credited with the defeat of South Dakota's merit selection ballot initiative in 2004 and the near defeat of an Iowa trial judge over his settlement of a property dispute involving a lesbian couple. The senior public policy director of Dobson's Focus on the Family organization explains: "Courts are overriding the will of the people. If we get involved in judicial elections, we might be able to change that."[44] In a radio address, Dobson compared the wrongs committed by black-robed judges with those of white-robed members of the Ku Klux Klan.[45]

With a barrage of last minute negative and misleading advertisements, Missouri Family Network, the Eagle Forum, and other religious and social conservative organizations unsuccessfully attacked a justice on the Missouri Supreme Court in 2004 for being too "liberal." Phyllis Schlafly, the founder of the Eagle Forum, has said, "There's nothing the matter with [judgeships] being political." California religious conservative Tony Andrade agrees: "That's what makes this country great," he says, "that we can influence the judiciary or any other branch of government."[46] Evangelist Pat Robertson claims that "liberal judges" probably pose a more seri-

ous threat to America "than a few bearded terrorists who fly into buildings."[47]

Unlike the past, today an extremely broad range of social and political issues are the subject of attacks on judges, including aid to private schools, the death penalty, immigration, abortion, takings of private property, assisted suicide, lawyers' fees, prayer in school, tort liability, teaching of evolution, affirmative action, gay rights and marriage, references to "God" in the Pledge of Allegiance, medical malpractice, religious displays, sentencing decisions, and end-of-life decisions. On most of these issues public opinion is strongly divided, and the two dominant political parties are polarized as well. In addition, views on many of the issues, especially those involving religious faith, are deeply and strongly held by adherents on both sides. As Family Research Council President Tony Perkins has noted, "Every issue we care deeply about has the fingerprints of judges on it."[48]

Most ominously, the major political parties, and many politicians, have apparently concluded that it is in their own political interest to use attacks on judges and courts to incite their respective political bases. "A good fight on judges does nothing but energize our base," said Republican Senator John Thune of South Dakota. "From a political standpoint, when we talk about judges, we win," added Republican Senator John Cornyn of Texas. Even the *Wall Street Journal* editorialized recently that a "filibuster fight would be exactly the sort of political battle Republicans need to energize conservative voters after their recent months of despond."[49] Those members of the bench and bar who led the successful defense of the Missouri Supreme Court justice challenged in 2004 concluded that the attacks weren't really aimed at defeating the justice but rather at raising turnout of conservative voters at the polls.[50] Attacks on judges yield greater financial and electoral support for the party, capital which can be expended for other purposes and on other issues.

Attacking judges has been lucrative for conservative religious organizations as well. In April 2004, for example, Dobson formed a new PAC, Focus on the Family Action, to support Focus on the Family's legislative and political issues and attacks on judges. In its first six months—the period leading up to the November 2004 elections during which Dobson participated in the rallies in Iowa, South Dakota, and many other states—the new PAC raised $8.8 million.[51]

In addition to attacks on individual judges, we are increasingly witnessing attacks on courts themselves as well as attempts to drastically change state judicial selection processes in an attempt to make judges more responsive to the popular will or political control. The Illinois Civic Justice League spent over $300,000 in 2004 to air a television ad that attacked "bad judges . . . and their trial lawyer friends" without ever mentioning a candidate or even a judicial race. Thomas Parker's primary campaign for a seat on the Alabama Supreme Court in 2004 featured an ad attacking the rulings of "liberal judges" without ever mentioning his opponent or suggesting the presence of liberal judges on the Alabama court.[52]

In several merit selection states there are efforts this year to change to contested elections in at least some parts of these states, as well as legislative efforts to require senate confirmation of gubernatorial appointments and even senate reconfirmation upon every new term of office.[53] Georgia recently moved its nonpartisan elections from the primary election to the general election in the fall in order to raise turnout for judicial and other races.[54] Bills have also been introduced in the Georgia legislature to return to the partisan judicial elections that Georgia utilized before switching to nonpartisan elections in 1983.

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countability, seek to provide further checks on judicial decisionmaking. One of the most novel attacks seeks to essentially abolish the doctrine of judicial immunity. JAIL (Judicial Accountability Initiative Law) 4 Judges is a self-proclaimed, single-issue national grassroots organization to end "judicial corruption," founded and led by Californian Ronald Branson, the "Five-Star National JAIL Commander-in-Chief." After being rebuffed by the courts—including the U.S. Supreme Court—14 times, Mr. Branson failed three times to get enough signatures to put his organization's proposed initiative measure on the California ballot. Branson's wife, Barbie, Associate Commander-in-Chief of JAIL, writes: "The People are slowly waking up to realize who the Enemy is—and it isn't Bin Laden." Ronald Branson adds: "We at JAIL get unlimited kicks at the judges' crotches and shins, and the judges must keep a straight face and pretend we don't exist. . . . If they assault us, they advertise for us and promote JAIL."[55]

A South Dakota group has qualified the national JAIL organization's initiative as constitutional Amendment E on the November 2006 ballot. The South Dakota Judicial Accountability Initiative Law would create a 13-member special grand jury with statewide jurisdiction "to determine whether any civil lawsuit against a judge would . . . fall within the exclusions of [judicial] immunity" as defined in the initiative and "whether there is probable cause of criminal conduct by the judge complained against." The special grand jury, supported in part by deductions from judges' salaries, would have the power to indict and to impanel a special trial jury with the power to adjudicate and sentence the offending judge. If the initiative is successful in South Dakota, the national JAIL 4 Judges organization hopes to use the momentum to qualify the initiative in other states.[56]

Fueled by the Colorado Supreme Court's rejection on single subject grounds of a proposed ballot initiative on immigration, a former leader of the Colorado Senate has sponsored a state constitutional initiative seeking to expand the state's term limits to cover appellate justices. The "Limit the Judges" initiative caps appellate service at three four-year terms and applies retroactively to incumbent justices, with the intended effect of sweeping five of the seven current supreme court justices from office within two years.[57] A constitutional initiative in Montana would allow citizens to recall elected judges through special recall elections.[58] In Oregon, Constitutional Initiative 24, known as the "Judicial Accountability Act," is designed to restore "judicial accountability and fair representation" by requiring that appellate judges be appointed and elected in the districts in which they reside.[59] Like California's Proposition 90, a "Property Owners Bill of Rights" on the 2006 Nevada ballot would revise state eminent domain proceedings. Unlike the California proposition, however, the Nevada constitutional initiative prohibits any judge "who has not been elected to a current term of office" from making any ruling in an eminent domain proceeding and authorizes a property owner to exercise a peremptory challenge of any justice of the state supreme court, as well as a judge of the trial court, in any eminent domain action.[60]

The New Politics of Judicial Elections: Redefining Permissible Conduct

The ABA Model Code of Judicial Conduct and state codes of judicial conduct generally admonish judges and candidates for judicial office to refrain from political activity that is inconsistent with the integrity, independence, and impartiality of the judiciary.[61] Over the last four years a number of restrictions on political activities of judges and judicial candidates have been found unconstitutional by the federal courts. The leading case is *Republican Party of Minnesota v. White*.[62] The Minnesota canon found to violate a judicial candidate's freedom of speech in *White* broadly prohibited a candidate from "announcing his or her views on disputed legal or political issues." The U.S. Supreme Court's decision in *White* was not totally surprising. The language of the Minnesota canon, especially as construed by the Court, was quite broad, and the holding of the Court was expressly quite narrow. Nor was the decision itself particularly damaging to the states' interest in upholding the rule of law and maintaining fair and impartial courts. Minnesota's canon was no longer contained in the ABA Model Code, fewer than 10 other states still retained it, and no state had ever enforced it.

Lower federal court decisions following *White* have expanded its reach significantly, however, ushering in a new politics of judicial elections. Four months after *White*, the Eleventh Circuit held sua sponte in *Weaver v. Bonner*[63] that the Georgia canon prohibiting judicial candidates from personally soliciting campaign contributions, also contained in the ABA Model Code and the codes of 30 other states, was unconstitutional under the reasoning of *White*. Although Justice Antonin Scalia's opinion in *White* had carefully observed that "we neither assert nor imply that the First Amendment requires campaigns for judicial office to sound the same as those for legislative office,"[64] the *Weaver* opinion flatly asserted that "the distinction between judicial elections and other types of elections has been greatly exaggerated, and we do not believe that the distinction, if there truly is one, justifies greater restrictions on speech during judicial campaigns than during other types of campaigns."[65]

The impact of this expansive reading of *White* on judicial elections was immediate. Judge Max Baer openly campaigned in 2003 as a pro-choice, pro-gun Democrat in seeking a seat on the Pennsylvania Supreme Court. Running unsuccessfully for a seat on the Ohio Supreme Court in 2004, an Ohio appellate justice, William O'Neill, blatantly declared his positions on disputed matters before the court, including school funding.[66] In Montana's 2004 nonpartisan supreme court elections, a member of the State House of Representatives unsuccessfully challenged an incumbent supreme court justice in an openly partisan campaign, saying that judicial candidates who failed to disclose their personal views were "cowardly."[67]

The 2006 Alabama Republican primary campaign for chief justice was noteworthy for the unabashed announcement of views by both candidates on the hot-button political issues of the day. The Chief Justice said, "I'm pro-life. Abortion on demand is a travesty,"[68] for example, while his challenger's Web site said he "fought as a conservative attorney for pro-life legislation for many years."[69] The Chief Justice explained: "Issues relating to the right to life and the sanctity of marriage are in the soul of Alabamians, and they want a judge who shares their conservative views." "It just so happens in Alabama people think a biblical foundation relates to impartiality and fairness," he said, "and they're right."[70]

Once it was clear that state judicial candidates were free to express their views on legal and

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"Once it was clear that state judicial candidates were free to express their views on legal and political issues, appellate and trial judges immediately came under pressure from special interests to do so. The principal form this pressure has taken is distribution of questionnaires to judges . . . to elicit their views on the political and social issues of particular concern to the questionnaire sponsor."

political issues, appellate and trial judges immediately came under pressure from special interests to do so. The principal form this pressure has taken is distribution of questionnaires to judges who are up for election that seek to elicit their views on the political and social issues of particular concern to the questionnaire sponsor. In 2003 at least four special interest groups surveyed Pennsylvania Supreme Court and trial court candidates on issues such as gay marriage, aid to religious schools, abortion, and the death penalty and used the responses in making endorsements.[71] In 2004, the Christian Coalition of Georgia and at least three other special interest groups asked judicial candidates their views on abortion, homosexuality, prayer in school, and other issues and incorporated the responses into a guide sent to 725,000 voters.[72] In 2006, the Georgia Coalition is posing a much more extensive list of questions to the candidates.[73] Similarly, in July 2006 in Florida, a member of the governor's trial court nominating commission who also serves as president of a group associated with Dobson's Focus on the Family organization launched the Florida Judicial Accountability Project. The primary goal of the project is to publish the 2006 Judicial Voter Guide reporting all judicial candidates' responses to a questionnaire soliciting the personal views of candidates on issues such as school vouchers, abortion rights, assisted suicide, and same-sex marriage.[74] Similar surveys have been sent to judicial candidates by conservative religious organizations and other groups in many other states.

At least four federal district court opinions arise out of similar circumstances and reach similar results. In Kentucky, North Dakota, and Alaska a right to life group distributed questionnaires to judges seeking their views on issues such as abortion, sexual orientation, school prayer, and display of the Ten Commandments. When some of the judges declined to answer the questionnaire, citing the "pledges and promises" and "commitment " canons of their state judicial ethics codes along with their recusal obligations, the right to life group filed suits claiming the three provisions were unconstitutional under *White*.

The first two challenged provisions provided that judicial candidates shall not "make pledges or promises of conduct in judicial office other than to faithfully and impartially perform the duties of the office" or "make statements that commit or appear to commit the candidate to a particular view or decision with respect to cases, controversies or issues that are likely to come before the court."[75] The three federal district courts involved in the cases arising in Kentucky, North Dakota, and Alaska held that the two challenged provisions unconstitutionally interfered with the right of the candidates to announce their views under *White*. (In *White* the U.S. Supreme Court had distinguished the "announce clause" from a "pledges and promises" provision and expressed no view on the constitutionality of the latter.)

The recusal provision in the three states provided that "a judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned . . . ."[76] The three courts upheld the constitutionality of the recusal provision as narrowly tailored to serve a compelling state interest.[77] All three courts made clear that their decisions did not *require* judges to answer the questionnaire and that judges might reasonably decline to do so. The North Dakota opinion was the most expansive:

> It should be noted that North Dakota has a recusal provision that ensures impartiality by requiring recusal anytime a judge is unable to render, or appears to be incapable of rendering, a fair and impartial decision. . . . North Dakota's recusal provisions ensure impartiality without restricting constitutionally-protected speech. . . . There is no question that an impartial judge is critical to due process and the administration of justice. A widespread belief

> that courts are not impartial—resulting in a loss of public faith in the legal system and an unwillingness to respect its authority—would destroy the judiciary as quickly as would an actual lack of impartiality. The public and individual litigants must be reassured that the judiciary will decide legal disputes based on the law alone rather than on any inherent bias or prejudice of the presiding judge. . . . Any judicial candidate who responds to a survey similar to the 2004 Voter's Guide Questionnaire may indeed create a serious ethical dilemma for himself or herself that would require recusal at a later date. It is well-established that there is a judicial obligation to avoid prejudgment and all litigants are entitled to "an impartial and disinterested tribunal" in both civil and criminal cases. [Citation][78]

In the fourth case, the Kansas District Court granted a preliminary injunction against enforcement of the Kansas "pledges and promises" and "commitment" clauses on the basis that the provisions were overbroad as applied to the questionnaire in issue and, like the other three district courts, upheld the constitutionality of the Kansas recusal provision. The court also enjoined enforcement of the Kansas "personal solicitation" clause, similar to the solicitation clause at issue in the *Weaver* case discussed earlier, on the grounds that it was not narrowly tailored to achieve impartiality and was overbroad as applied to the plaintiff potential judicial candidate.[79]

As construed by the lower federal courts, *White* introduces a new brand of politics into judicial elections—treating candidates for judicial office like politicians running for political office—that threatens to undermine important values of judicial independence and judicial restraint while providing only illusory public benefit. The freedom to announce one's views on controversial legal and political issues has the effect of pressuring candidates to respond to questionnaires or appeals from special interests—in order to avoid active electoral opposition or to obtain electoral or financial support—by expressing personal views that are an improper basis of judicial decisionmaking in the first place and irrelevant to any issue that will arise in the vast majority of cases. In those instances in which the personal views of the candidate on an issue become relevant to a disputed legal issue in a case now before the successful candidate as a judge, the judge may very well be required to recuse because the judge's impartiality might now quite reasonably be questioned. Having obtained election to office on the basis of such an announcement, the judge might reasonably be expected to now feel at least some pressure to keep the earlier "promise" or honor the earlier "commitment." With respect to voters and special interests who relied on the judge's earlier announcement in providing electoral or financial support to the candidate, the judge's recusal under these circumstances deprives the relying parties of the entire consideration for which they provided their electoral support—in effect defrauding supporters of the judge's promised performance. It is difficult to imagine a judicial election process that is more likely to destroy public trust in the proper role of an elected judiciary—public trust upon which both appointed and elected judiciaries ultimately depend.

Partisan Involvement in Nonpartisan Judicial Elections

As noted earlier, there has been a reform trend in judicial elections moving away from partisan and toward nonpartisan judicial elections. Thirty-two states now employ some form of nonpartisan judicial election. The move to nonpartisan judicial elections is intended to minimize inappropriate partisan political influence on courts, judges, and judicial decisions. In comparison to nonpartisan elections, partisan judicial elections tend to be more contentious and attract more television advertising, more negative attack ads, and

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greater involvement by special interests, while, on average, costing about three times as much.[80] The first of 20 recommendations contained in the call to action issued by the National Center for State Courts based on the 2000 National Summit on Improving Judicial Selection recommends that "all judicial elections should be conducted in a non-partisan manner."[81]

Nearly all states with nonpartisan judicial elections have adopted canons of ethics or codes of judicial conduct designed to restrict the partisan political activities of judicial candidates. Such provisions include prohibitions on holding any office within a political party, making speeches on behalf of political parties, making contributions to political parties, and endorsing political candidates.[82]

The most important post-*White* federal court decision, the decision of the Eighth Circuit Court of Appeals upon remand from the Supreme Court,[83] threatens to further politicize nonpartisan judicial elections. In the Eighth Circuit's *White* decision, an attorney candidate for the Minnesota Supreme Court who sought to identify himself as a Republican, attend a Republican Party meeting, and obtain the endorsement of the Republican Party challenged the "partisan activities" restrictions of Minnesota's Code of Judicial Conduct providing that judicial candidates "shall not . . . identify themselves as members of a political organization . . . [or] attend political gatherings; or seek, accept, or use endorsements from a political organization." Sitting en banc, the Eighth Circuit Court of Appeals held the challenged provisions unconstitutional for being, like the "announce" clause at issue in the Supreme Court's *White* decision, "underinclusive," in this instance, by failing to preclude similar candidate involvement with other "interest groups."

The Eighth Circuit's White *opinion, applicable at present only to the states of that circuit, thus expressly authorizes judges and judicial candidates in nonpartisan judicial elections to seek, obtain, and use endorsements and support from political parties . . . .*

The attorney candidate also sought to personally sign solicitation letters seeking campaign contributions and to personally solicit from "large groups," and challenged Minnesota's code provision prohibiting a judicial candidate from personally soliciting campaign contributions and providing instead for creation of candidate committees for that purpose. Noting that any contributions still had to be made to the candidate's campaign committee, which was precluded from disclosing the identity of donors to the candidate, the court invalidated the challenged provision to the extent it prohibited the plaintiff's proposed conduct on the ground that the provision did not advance any compelling state interest.

The Eighth Circuit's *White* opinion, applicable at present only to the states of that circuit, thus expressly authorizes judges and judicial candidates in nonpartisan judicial elections to seek, obtain, and use endorsements and support from political parties, and to personally solicit campaign funds in writing and in presentations to "large groups," at least where the contributions are not made directly to the judge but to a campaign committee prohibited from disclosing the identities of the donors to the judge.

Conclusion

In *North Dakota Family Alliance, Inc. v. Bader,* cited earlier, the Chief Judge of the North Dakota District Court, Daniel L. Hovland, reflected on the long-term implications of the *White* decision:

> To say that there is considerable uncertainty regarding the scope of the Supreme Court's decision in *White* is an understatement. . . . Whether the decision in *White* left any room for the regulation of the speech of judicial candidates is a question yet to be resolved. However, it is clear the *White* decision dramatically altered the landscape of judicial elections. It has caused, and will continue to cause, considerable uncertainty and consternation on the part of judicial candidates.[84]

As presently construed by lower federal courts, the U.S. Supreme Court's decision in *White* has indeed dramatically altered the landscape

of judicial elections. In consistently suggesting that there is no true distinction between judicial elections and elections for political office, the federal courts have substantially undermined the considerable efforts of elected state judiciaries to preserve their ability to attract and retain qualified judges, and at the same time uphold the rule of law, by insulating sitting judges from inappropriate political influence and involvement.

Of course, no system of judicial selection or removal is totally devoid of political implications. An additional challenge presented by judicial elections as a means of judicial selection or removal, however, is the typical absence of any fair and impartial process for screening the suitability and qualifications of candidates for judicial office, including evaluation of the performance of incumbent judicial officers, or for communicating relevant and unbiased information about the candidates to the voters. In contrast with judicial selection, judicial removal greatly compounds this additional challenge because, as the Founders recognized, removal of sitting judges presents much greater and more direct risks to judicial independence than the selection of new judges. In simultaneously seeking to both select judges and consider the potential removal of sitting judges, contested judicial elections involving incumbent officeholders present the greatest challenge to the ability of the judicial branch to attract and retain qualified judges and, at the same time, protect the independence of current judicial officeholders. In dramatically altering the landscape of judicial elections, the post-*White* decisions of the lower federal courts have greatly exacerbated all three of these challenges to elected state judiciaries: attracting and retaining qualified judges; communicating relevant and unbiased candidate information to voters; and upholding the rule of law by insulating sitting judges from inappropriate political influence and involvement.

This article has examined not only the new politics of judicial elections spawned by the *White* and post-*White* decisions, but also other critical ways in which state judicial elections have become increasingly like elections for political office, and how state courts, state court judges, and the special rules that insulate judges and courts from the politics traditionally associated with the other two branches of government are under political attack.

Often these attacks are motivated by an expressed desire to hold judges and courts "accountable" for their judicial decisions. There is nothing improper, of course, in demanding judicial accountability. In our democracy, judges and courts must be publicly accountable for their performance just as other governmental officers and institutions are for theirs. Indeed, it is critical to the preservation of public trust in the judicial branch of government that courts continuously and successfully demonstrate their accountability for the quality of their performance.[85]

Under the rule of law, however, judges are not accountable for the legal correctness of their decisions to the other branches of government, or the popular will at any particular moment in time, or to any powerful constituent, special interest, or particular segment of the public. Under the rule of law, judges are accountable for the legal soundness of their judicial decisions primarily to the law and the state and federal Constitutions, as interpreted and applied by higher courts. The rule of law is meaningless and reduced merely to the rule of individual men and women if judicial decisions must be submitted to the leaders of other branches of government, special interests, or popular referendum for approval as a condition of remaining on the bench.

If the challenges summarized in this article continue to overtake the operations of the state courts, they will ultimately compromise the integrity of the state courts and limit the capacity

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of the state courts to keep faith with the rule of law. The ability of judges to decide disputes based solely on the relevant evidence and applicable law will become increasingly dependent, as the Founders feared, on the will or approval of the politically powerful or popular.

States with judicial elections have no less interest than the federal government in preserving the rule of law. Yet state judges may not in the future be able to ensure the integrity, fairness, and impartiality of the state courts, and the state courts may no longer be able to secure unto Americans their rights under state and federal Constitutions. Public trust in the state courts, founded on the belief that judicial decisionmaking processes are apolitical, and in that important respect different than those of the other two branches, will be gradually eroded. Americans will be left with a two-tier court system: a federal court system of limited jurisdiction which—although not fully independent of improper political influence—has by reason of federal judges' life tenure in office much greater ability to keep faith with the rule of law; and a weaker and inferior state court system of general jurisdiction where today 95 percent of the business of the courts is conducted, but which tomorrow may no longer be able to guarantee its ability to uphold the rule of law or people's individual rights in the face of any concerted political resistance.

As this article cautioned at the outset, these challenges pose significant risks—to elected state judiciaries in general and to the California judiciary in particular—that are not going to go away. There is nothing unique about the California court system that immunizes it from these dangers. California has no unique laws on its books that provide certain protection. California's nonpartisan tradition is no deeper or richer than Minnesota's. There's no indication that the advocates of robust exercise of full First Amendment rights by state judicial candidates are tiring of their consistent stream of successes in the federal courts. These challenges to the ability of the California judicial branch to administer justice to all fairly and impartially are real and are presently upon us. It is time for the leadership of the California bench and bar to confront this reality and determine what it can do to stem the tide in California. These challenges will certainly cause consternation in the future not only for California judges and judicial candidates but for all Californians. They deserve the attention of California judicial policymakers today.

Endnotes

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2. Frederick Quinn, ed., *The Federalist Papers Reader* (Seven Locks Press, 1993), pp. 163–168.
3. Three states, Connecticut, New Jersey, and Pennsylvania, provided for a term of years rather than life tenure. Robert W. Tobin, *Creating the Judicial Branch: The Unfinished Reform* (National Center for State Courts, 1999), p. 28.
4. Larry C. Berkson (updated by Rachel Caufield), "Judicial Selection in the United States: A Special Report," *www.ajs.org/js/Berkson_2005.pdf*.
5. Kermit L. Hall, "The Judiciary on Trial: State Constitutional Reform and the Rise of an Elected Judiciary, 1846–1860" (1983) 44 *Historian* 337, 338–352.
6. *Ibid*.
7. Roy Schotland, presentation to the California Judicial Council, June 22, 2005.
8. See Berkson, *supra* note 4.
9. *Ibid*.
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11. *Id*. at pp. 36–38.
12. Roy A. Schotland, "New Challenges to States' Judicial Selection," in *Background Papers for Fair and Independent Courts: A Conference on the State of the Judiciary* (American Law Institute and Georgetown University Law Center, 2006), pp. 139, 161; Roy A. Schotland, *To the Endangered Species List, Add: Nonpartisan Judicial Elections* (2003) 39 Willamette L. Rev. 1397, 1401, fn. 24.
13. Brief of the Conference of Chief Justices as Amicus Curiae in Support of Petitioners' Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit at fns. 3, 8, *Republican Party of Minnesota v. White* (8th Cir. 2005) 416 F.3d 738 (en banc), cert. denied *sub nom. Dimick v. Republican Party of Minnesota* (2006) 126 S.Ct. 1165 (No. 05-566, Jan. 4, 2006).
14. Herbert M. Kritzer, "Law is the Mere Continuation of Politics by Different Means: American Judicial Selection in the 21st Century," a paper presented at a program on "Politics and Picking Judges" at the William Mitchell College of Law on September 25, 2006.
15. American Judicature Society, "Judicial Selection in the States: General Jurisdiction Courts" (updated Jan. 2004), *www.ajs.org/js/Judicial SelectionCharts.pdf*.
16. Nancy Perry Graham, "The Best Judges Money Can Buy" (Dec. 2000/Jan. 2001) *George*.
17. Judicial election spending in California in 2002 totaled $7 million whereas in Florida trial court candidates spent $16 million. Professor Roy Schotland attributes the disparity partly to the larger number of judicial campaign consultants in Florida. Schotland (presentation), *supra* note 7.
18. ABA, *Report and Recommendations of the Task Force on Lawyers' Political Contributions* (Part Two, 1998), pp. 13–14.
19. Schotland (presentation), *supra* note 7.
20. The data in this paragraph is from Melinda Gann Hall, "Judging the Election Returns: Competition as Accountability in State Supreme Court Elections" (forthcoming 2006).
21. Unless otherwise indicated, the spending and television advertising data presented here is from Goldberg, Samis, Bender, Weiss, and Rutledge, *The New Politics of Judicial Elections 2004* (Justice at Stake Campaign, 2005).
22. Adam Liptak and Janet Roberts, "Campaign Cash Mirrors a High Court's Rulings," *N.Y. Times* (Oct. 1, 2006).
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28. Center for Political Accountability, *Hidden Rivers: How Trade Associations Conceal Corporate Political Spending: Its Threat to Companies, and What Shareholders Can Do* (2006).
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30. Goldberg et al., *supra* note 21.
31. (2005) 543 U.S. 551.
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33. See Mauro, *supra* note 32; Justice at Stake Campaign, "Candidates for Alabama's Supreme Court Raise More Money, Invest in TV Ads at Greater Rates Than in 2004" (June 14, 2006); Justice at Stake Campaign, "Alabama's Supreme Court Primary Campaigns Highlight Radical Transformation of State Judicial Elections" (June 2, 2006); Drew Jubera, "There's nothing civil about Alabama judicial race," *Atlanta Journal Constitution* (June 5, 2006).
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35. *Ibid*.
36. Adam Liptak, "Case Studies: West Virginia and Illinois," *N.Y. Times* (Oct. 1, 2006).
37. Liptak and Roberts, *supra* note 22.
38. *Ibid*.
39. See *www.justiceatstake.org/files/JASJudgesSurveyResults.pdf*.
40. See Roger K. Warren, "Judicial Accountability, Fairness, and Independence" 42(1) *Court Review* p. 4.
41. Mike France and Lorraine Woellert, "The Threat to Justice: How Politics, Ideology, and Special Interests Are Compromising the Courts" (Sept. 27, 2004) *Business Week*.
42. *Ibid*.
43. Erin Shannon, "State Supreme Court justices must answer for their actions," *Seattle Times* (July 18, 2006).
44. Margaret Ebrahim, "The Bible Bench" (May/June 2006) *Mother Jones*.
45. In response, conservative *National Review* columnist Jonah Goldberg suggested that Dobson "spend a couple minutes breathing into a brown paper bag before he does his next radio show." See *www.justiceatstake.org/contentViewer.asp?breadcrumb=3,551,617*.
46. Ebrahim, *supra* note 44.
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49. See *www.justiceatstake.org/contentViewer.asp?breadcrumb=3,551,806*.
50. Schotland, "New Challenges," *supra* note 12, at pp. 144–145.
51. Ebrahim, *supra* note 44.
52. The full texts of the ads are reported in Goldberg et al., *supra* note 21, pp. 17, 33.
53. Schotland, "New Challenges," *supra* note 12, at p. 144.
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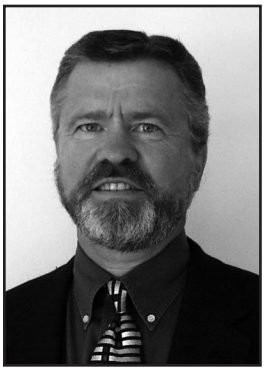
55. See *www.jail4judges.org*.
56. A good source of information on the initiative is the "No on E" Web site, at *http://no-on-e.com/index.php*.
57. John Andrews, "Ten Years and Out," *Wall Street Journal* (Aug. 10, 2006).
58. In September 2006, a Montana trial judge removed the initiative from the ballot on the basis of fraud "perpetrated by paid, out-of-state, migrant signature gatherers." While acknowledging that more than $600,000 of the initiative's financial support came from out-of-state national organizations, the backer of the initiative said of the trial court action: "This is an example of judicial activism of absolutely the worst sort. To see the voters get smacked in the face by one judge and the testimony of nine people," he added, "is inexcusable." The initiative proponents' appeal to the Montana Supreme Court was still pending in early October. Chelsi Moy, "Judge throws out ballot initiatives," *Great Falls Tribune* (Sept. 14, 2006).
59. See *www.sos.state.or.us/elections/irr/2006/024text.pdf* (last accessed Aug. 18, 2006).
60. See *www.propertybillofrights.com* (last accessed on Aug. 18, 2006).

61. See, e.g., canon 5, ABA Model Code of Judicial Conduct and canon 5, California Code of Judicial Ethics (A Judge or Judicial Candidate Shall Refrain From Inappropriate Political Activity).
62. (2002) 536 U.S. 765, revg. *Republican Party of Minnesota v. Kelly* (2001) 247 F.3d 854. The Eighth Circuit's decision on remand is cited in footnote 1, *supra*.
63. (11th Cir. 2002) 309 F.3d 1312.
64. (2002) 536 U.S. 765, 783.
65. (11th Cir. 2002) 309 F.3d 1312, 1322–1323.
66. In 2006, Justice O'Neill is running again as the Democratic candidate against Justice Terrence O'Donnell, the successful Republican candidate in 2004. This time, refusing to accept any campaign contributions, O'Neill is running a campaign against O'Donnell's extensive fundraising activities. *The Brennan Center Court Pester E-lert* (May 23, 2006).
67. These examples are cited in Goldberg et al., *supra* note 21.
68. Justice at Stake Campaign (June 14, 2006), *supra* note 33.
69. Justice at State Campaign (June 2, 2006), *supra* note 33.
70. Jubera, *supra* note 33.
71. Pennsylvanians for Modern Courts, "As Pennsylvania Goes, So Goes the Nation: A Case Study of a Supreme Court Election in the Post-*White* Era," *www.pmconline.org/pagoesnation.htm*.
72. *Ibid*.
73. Alyson Palmer, "Christian Group's Judge Survey Draws Fire," *Fulton County Daily Report* (July 25, 2006).
74. *Christian News Wire* (July 24, 2006).
75. *Alaska Right to Life Political Action Committee v. Feldman* (D.Alaska 2005) 380 F.Supp.2d 1080, 1082–1083.
76. *Alaska Right to Life Political Action Committee, supra*, 380 F.Supp.2d at p. 1084.
77. *Alaska Right to Life Political Action Committee, supra*, 380 F.Supp.2d 1080; *North Dakota Family Alliance, Inc. v. Bader* (D.N.D. 2005) 361 F.Supp.2d 1021; *Family Trust Foundation of Kentucky v. Wolnitzek* (E.D.Ky. 2004) 345 F.Supp.2d. 672.
78. *North Dakota Family Alliance, supra*, 361 F.Supp.2d at pp. 1038–1039.
79. *Kansas Judicial Watch v. Stout* (D.Kan. 2006, Case 5:06-cv-04056-JAR-KGS). Similar cases are also pending in Indiana and Kentucky. Plaintiffs in a similar Pennsylvania case were held to lack standing. *Pennsylvania Family Institute v. Black* (M.D.Pa. 2005, No. Civ. 105CV2172).
80. States with partisan elections, and states like Michigan and Ohio in which the political parties select judicial candidates and participate actively in their campaigns, have been the focal point of the "ever-rising tide" discussed earlier. In addition to Michigan and Ohio, they include Alabama, Illinois, Louisiana, Pennsylvania, West Virginia, and Texas.
81. *Call to Action: Statement of the National Summit on Improving Judicial Selection* (National Center for State Courts 2002).
82. See, e.g., canon 5A, California Code of Judicial Ethics.
83. *Republican Party of Minnesota v. White* (8th Cir. 2005) 416 F.3d 738 (en banc), cert. denied *sub nom. Dimick v. Republican Party of Minnesota* (2006) 126 S.Ct. 1165.
84. *North Dakota Family Alliance, supra*, 361 F.Supp.2d at pp. 1041–1042.
85. See Warren, *supra* note 40.



About the Author

Roger Warren is the AOC Scholar-in-Residence. From 1996 to 2004 Judge Warren served as president and chief executive officer of the National Center for State Courts (NCSC), the national judicial reform organization. During his tenure as president, new NCSC initiatives were established to promote public trust and confidence, best practices, civil justice reform, and racial and ethnic fairness. National communities of practice were established in the fields of family violence, jury reform, problem-solving courts, workload assessment, and court performance. Before joining NCSC, Judge Warren served for 20 years on the Sacramento County trial courts, where he held various positions including presiding judge of the superior court. Judge Warren was executive director of Legal Services of Northern California before his appointment to the bench in 1976. He was a Reginald Heber Smith Fellow from 1969 to 1971. He received his B.A. from Williams College, an M.A. in political science from the University of Chicago, and a J.D. from the University of Chicago Law School, where he was projects editor of the University of Chicago Law Review.